NO. 46451-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARK LEE VIPPERMAN, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson, Judge

No. 14-1-00996-0

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Constitutional Provisions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly accept defendant's guilty plea after determining it was made voluntarily, competently and with a full understanding of the nature and consequences of the plea?

B. STATEMENT OF THE CASE.

On March 13, 2014, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, Mark Lee Vipperman ("defendant"), with assault in the second degree and malicious harassment in Pierce County Cause No. 14-1-00996-0. CP 1-2. Both of these charges also alleged a deadly weapon enhancement. *Id.* The declaration for determination provided the following information about the basis for the charges:

> That in Pierce County, Washington, on or about the 12th day of March, 2014, the defendant, MARK LEE VIPPERMAN, JR, did commit assault in the second degree and/or malicious harassment. The victims, J. and L. Jones, are listed as a black female and male. The defendant is listed as a white male. The victims call police to report that they were walking on a bridge over the Puyallup River when they were approached by the defendant who threatened to cut them. More specifically, the victims state the defendant came up running from behind them yelling racial slurs and calling them "niggers." At some point, he pulls a large machete type knife from his waist area and held it out saying he was going to cut them. He told the male victim that he was going to cut his throat and cut off his "dick." The defendant was also yelling they were liars.

CP 3. An amended information was filed adding an additional charge of intimidation of a witness. CP 4-6.

On May 12, 2014, the matter came on for trial before the Honorable Ronald E. Culpepper. 5/12-13/2014 RP 3-4. After some preliminary motions, the case was recessed for the day. *Id.* at 7-16. The next day, defense counsel wanted to bring a suppression motion and the trial was continued in order to give the prosecution an opportunity to respond. 5/12-13/2014 RP 17-21.

On May 28, 2014, the parties were before the Honorable Frank E. Cuthbertson, for entry of plea to a second amended information. 5/28/2014 RP 2; CP 21. In exchange for a guilty plea, the prosecution agreed to drop the assault in the second degree and intimidation of a witness counts, and permit defendant to plead guilty to malicious harassment with a deadly weapon enhancement. After defense counsel assured the court that defendant was ready to enter a knowing, voluntary and intelligent plea, the court engaged defendant in a colloquy to assess defendant's understanding of his actions. *Id.* at 2-6. After receiving assurances from defendant that he understood what he was doing and pleading guilty of his own free will, the court accepted his guilty plea. *Id.*

The court sentenced defendant to a standard range sentence of 13 months, plus an additional six months for the deadly weapon

enhancement. 5/28/2015 RP 8. The court also imposed $1300.00 in legal financial obligations. CP 35-47.

Defendant filed a timely notice of appeal from entry of this judgment. CP 48.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ACCEPTED DEFENDANT'S GUILTY PLEA AFTER DETERMINING IT WAS MADE VOLUNTARILY, COMPETENTLY, AND WITH A FULL UNDERSTANDING OF THE NATURE AND CONSEQUENCE OF THE PLEA.

A court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2. The State bears the burden of proving the validity of a guilty plea. ***Wood v. Morris***, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). The record from the plea hearing must establish that the plea was entered voluntarily and intelligently. ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) citing ***Wood***, 87 Wn.2d at 511. When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. ***State v. Smith***, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing ***State v. Perez***, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain,

there is a presumption that the plea is knowing, intelligent and voluntary. ***In re Personal Restraint of Ness***, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). "A defendant's signature on the plea form is strong evidence of a plea's voluntariness." ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes "well nigh irrefutable." ***Branch***, 129 Wn.2d at 642 n.2; ***State v. Stephan***, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant "will not now be heard to deny these facts." ***In re Personal Restraint of Keene***, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

For the first time on appeal, defendant disputes the voluntariness of his plea. He alleges that he did not understand that his threat had to be a "true threat," that is a statement made in a context or under such circumstances that a reasonable person would foresee that it would be interpreted as a serious expression of intended harm. Appellant's Brief at p. 5. The State does not contest that he may challenge the taking of his plea for the first time on appeal. Generally, a voluntary guilty plea acts as a waiver of the right to appeal all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea, or to challenges of the State's legal power to prosecute regardless of

factual guilt. ***State v. Smith***, 134 Wn.2d 849, 852-553, 953 P.2d 810 (1998). His failure to raise a challenge in the trial court, however, means that there is no affirmative evidence that his attorney did not explain the concept of a true threat to him or that he did not understand that his threat had to be a true threat.

Defendant argues that the record does not establish that he understood the concept of a "true threat" and how that concept related to his crime. To avoid violating the First Amendment, a statute criminalizing threatening language must be construed "as proscribing only unprotected true threats." ***State v. Allen***, 176 Wn.2d 611, 626, 294 P.3d 679 (2013)(felony harassment); ***State v. Read***, 163 Wn. App. 853, 261 P.3d 207 (2011); ***State v. Tellez***, 141 Wn. App. 479,484, 170 P.3d 75 (2007)(felony telephone harassment "true threat" requirement is not an essential element of harassment statutes). A true threat is " 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." ***Allen***, 176 Wn.2d at 626. Communications are not true threats if they are in fact "merely jokes, idle talk, or hyperbole." ***State v. Schaler***, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). This principle is codified in the malicious harassment statute as words alone do

not constitute a crime "unless the context or circumstances surrounding the words indicate the words are a threat." RCW 9A.36.080(1)(c).

In this case, the record shows that defendant's pleas were made voluntarily, competently, and with a full understanding of the nature and consequences of the pleas. First, this plea was entered after the case had been called for trial on charges of assault in the second degree, malicious harassment and intimidation of a witness; defendant was represented by two attorneys. CP 4-6; 5/12-13/2014 RP 3-5. Defense counsel moved in limine to exclude the fact that defendant had been in prison even though this had allegedly been conveyed to the victims, arguing:

> DEFENSE COUNSEL: And, as alleged, Mr Vipperman ran up to them and made a number of racial comments and is alleged to have threatened them, threatened to cut the male victim with a knife, and as part of that he indicated that he had been to prison, that he runs the Northwest. And our position is that in the context of the entire encounter, the probative value of that statement concerning prison is minimal..."

5/12-13/2014 RP 12. The prosecutor argued defendant's statement about being in prison was relevant because if most people heard that from someone they did not know who was also threatening them, it would raise their level of concern. 5/12-13/2014 RP 12. Thus, the prosecutor argument was this evidence was relevant as to whether the threat defendant made was a "true threat." This shows that the concept of a true

threat was being discussed in court. The trial did not proceed the next day as originally planned because defense counsel filed an untimely motion to suppress, and the court continued the trial to give the prosecution time to respond. 5/12-13/2014 RP 17-21. Thus, defendant's plea came after his attorney had prepared for trial and discussed trial strategy with defendant. 5/12-13/2014 RP 17-18.

Approximately two weeks later, defendant represented by counsel, entered into a plea agreement with the State to resolve the charges against him. 5/28/14 RP 2-3. In exchange for a guilty plea to malicious harassment with a deadly weapon enhancement, the State agreed to dismiss the most serious charge of assault in the second degree, as well as the intimidation of a witness. *Id.* Defendant completed a plea statement with the assistance of counsel; defense counsel indicated that he had read the entire plea to his client and "answered all his questions to his satisfaction." *Id.* at 3. Counsel concluded by stating:

> As a result of my conversations with him, I do believe he's entering into this knowingly, intelligently and voluntarily, and ask the Court to accept [his guilty plea].

Id. Defendant affirmed his understanding of the consequences of that plea and his willingness to enter a plea to the trial court. 5/28/14 RP 3-6. The court specifically asked defendant if his attorney "explain[ed] what malicious harassment is and what a deadly weapon enhancement

involves?" *Id.* at 4. Defendant affirmatively represented to the court that his attorney had done so. *Id.* Defendant then acknowledged that the paragraph describing what he had done to make himself guilty was his own statement. *Id.* at 5. Defendant's statement was as follows:

> On March 12, 2014, in Pierce County, Washington, I maliciously and intentionally threatened L.J. and J.J. and placed them in reasonable fear of harm to their persons because of my perception of their race. In the commission of making the threat, I was armed with a knife, a deadly weapon.

5/28/14 RP 5. In his allocution, defendant apologized to the victims; he said nothing to indicate that they had misunderstood his intentions or that he was joking. 5/28/14/RP 8. Under the authority cited above, this record shows of the taking of a knowing and voluntary plea.

Defendant's arguments ignore that his attorney represented to the court that he had thoroughly discussed the plea with defendant. An attorney is presumed to have provided competent representation. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). This court must presume that as defendant's counsel prepared first for trial and then for defendant's plea, that he discussed the elements of malicious harassment and what the prosecution was required to prove. The record affirmatively shows that defense counsel did discuss the case, including the elements of malicious harassment, with defendant pretrial and pre-plea. 5/12-13/2014

RP 17-18; 5/28/14 RP 2-3, 3-6. After having these discussions and answering defendant's questions, the attorney was satisfied that the guilty plea would be knowing, voluntary, and intelligent.

Moreover, nothing in the factual basis defendant provided to the court indicates that threats he made were anything other than true threats or that the victims were chosen because of their race. The declaration for determination for probable cause also provides some illumination of what the State's evidence would have been had this case proceeded to trial. CP 3. In short, the record below indicates that after preparing to go to trial, defendant was aware of the state's evidence and what it would have to prove at trial; he entered the plea agreement to take advantage of the offer.

The record shows a knowing, voluntary, and intelligent plea. The trial court should be affirmed.

D. CONCLUSION.

The State asks this Court to affirm the trial court's acceptance of defendant's guilty plea.

DATED: February 2, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-2-15 Theresa Vipperman
Date Signature

PIERCE COUNTY PROSECUTOR

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